security, whether a trust had been created or whether and when there could be a redemption of the security and so on. The deed of assignment and for that matter the National Land Code charge and the guarantees each has to be looked at *per se* within each document's four corners as to the effect of each of them. However, for the circumstance and the basis on which they came to be created, the loan agreement pursuant to which the documents were created can and should be looked into. That did not, as was succinctly stated in *Nouvau Mont Dor*, derogate from the absolute character of the assignment or make inroads into the effect of the National Land Code Charge or the guarantees.

Accordingly I have to hold that the second line of argument is equally without merit.

I pause to note that the indemnity clause in the deed of assignment appears to put paid to the defendants' contention that there was an obligation on the part of the assignee to pay off what was owing on the sale and purchase agreement. It would appear that by the terms of the deed of assignment it was the intention of the parties that it was for the assignor to pay off the balance of the agreed purchase price and further it was expressly provided that upon such payment being effected the assignor would have the lands transferred into its name and thereafter have it charged (presumably under the provisions of the National Land Code) in favour of the assignor whereupon the assignment "shall have no further force or effect."

On the ground that the defendants have not provided any acceptable explanation for the inordinate delay in taking out their application to set aside the judgment entered on the 14 April 1989, and that in any event the proposed lines of argument to be advanced against the application for summary judgment are without any merit, the application enclosure (27) in the court file is dismissed with costs.

PARASURAMAN A/L KUPPAN

v.

SAZALI BIN AKHIR & ANOR.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL APPEAL NO. 12-43-1991]
30 DECEMBER 1992

PRACTICE & PROCEDURE: Application for extension of time to file Memorandum & Record of Appeal - Principles applicable - Order 49 Subordinate Court Rules 1980 - Order 55 Rules of the High Court 1980.

The appellant being dissatisfied with the decision of the learned Judge of the Sessions Court, filed a Notice of Appeal against the said decision. The Registrar of the Court notified the solicitors of the appellant, by letter that the grounds of judgment were ready and requesting for certain sums of money to be deposited in the Court as security for costs of the appeal. After a month the Registrar sent another letter stating that the Court deemed the appeal as withdrawn since the appellant had failed to lodge any money as security for the costs of the appeal.

The appellant then made an application to the High Court for extension of the statutory period within which to file his record and memorandum of appeal and for the extension of the statutory period within which to lodge the deposit in the Sessions Court for security of the costs of the appeal.

The question before the Court was whether the appellant had received a proper notification as prescribed under Form 141, Subordinate Courts Rules 1980 (SCR) read with O. 49 r. 2(4).

Held:

[1] A copy of the notes of evidence and grounds of judgment must be ready before notification under Form 141 is sent out by the Court. The Court appealed from would have to have the notes of evidence already typed, corrected and certified and the grounds of decision of the judicial officer against whose decision the appeal was lodged already ready. The Registrar of the Court appealed from must comply strictly with O. 49 r. 2(4) SCR 1980.

[2] The notes of evidence were not ready before 21 December 1991, the date in the letter of notification sent by the Registrar of the

Sessions Court to the applicant's solicitors and as such the notification deviated substantially from the prescribed form and was misleading and is invalid.

[3] The application for extension of time is misconceived because the applicant has yet to receive from the Registrar a proper notification as prescribed under Form 141 SCR 1980 read with O. 49 r. 2(4) SCR and the time for taking the various steps under the said O. 49 and under O. 55 r. 2 Rules of the High Court 1980 to prosecute the appeal in the High Court had not started to run for him.

[Application dismissed. No order as to costs.]

Cases referred to:
Kuching Pharmacy Sdn. Bhd. v. J.L. Morison Son & Jones (M) Sdn. Bhd. [1990] 1 CLJ 508/[1990] 2 MLJ 170 ***(refd)***
Hj. Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man [1990] 3 MLJ 45 ***(refd)***
Shafie bin Ahmad v. Hajjah Fatimah bt. Ahmad & 3 Ors. [1991] 3 CLJ 2217 ***(refd)***
Elayachee v. Woo Sin Tip [1991] 3 MLJ 108 ***(refd)***

Legislation referred to:
Limitation Act 1967 s. 62
Rules of the High Court 1980 O. 55 r. 2
Subordinate Court Rules 1980 O. 49 rr. 2, 3, 3A, 5

For the appellant - Francis V. Nathar; M/s. Francis Nathar & Co.
For the respondents - S. Visvanathan; M/s. Syarikat Visva

JUDGMENT

K.C. Vohrah J:
The second plaintiff in Civil Action No. 53-131-89 is dissatisfied with the decision of the Judge of the Jitra Sessions Court. In August 1991 the second plaintiff through his solicitors filed a notice of appeal against the said decision of the Judge of the Sessions Court, Jitra.

Nature of Application

Before me the application is for the extension of the statutory period within which the appellant can file his record and memorandum of appeal and for the extension of the statutory period within which he can lodge the deposit in the Sessions Court, Jitra, for security of the costs of the appeal.

It is not disputed that a letter dated 21 December 1991 from the Registrar of the Sessions Court, Jitra notifying the solicitors of the appellant that the grounds of decision were ready and requesting for certain sums of money to be deposited in the Court was received by an employee of the solicitors for the appellant at the solicitor's office on 27 December 1991. The solicitor in charge of the appeal became aware of this letter only on 29 January 1992 when he received a letter from the Registrar stating that the Court deemed the appeal as withdrawn since the appellant had failed to lodge RM250 as security for the costs of the appeal. There is no doubt from the two affidavits filed in support of the application that the employee who received the letter was careless in having mislaid the letter and for not having brought the earlier letter to the solicitor's notice. That however is not relevant as I think the application before me for extension of time is misconceived.

I say it is misconceived because the applicant has yet to receive from the Registrar a proper notification as prescribed under Form 141 of the Subordinate Court Rules 1980 (the SCR) read with O. 49 r. 2(4); and the time for taking the various steps under the said O. 49 and under O. 55 r. 2 of the Rules of the High Court 1980 to prosecute the appeal in the High Court has not started to run for him.

Amendment of Order 49 of Subordinate Court Rules 1980 by P.U. (A) 67/1988 and P.U. (A) 460/1990

The 1980 O. 49 of the SCR was amended in 1981. There was substituted for it a new O. 49 by P.U. (A) 127/1981, the effective date for the substitution being 1 April 1981. Then in 1988, by P.U. (A) 67/1988, certain amendments were again made to O. 49 of the SCR, these amendments taking effect as from 1 August 1987. Other amendments were made by P.U. (A) 460/1990, these taking effect on 1 January 1991. Unfortunately the 1988 amendments spawned some confusion as to, *inter alia*, the time frame within which an appellant who is represented by solicitors had to file a memorandum of appeal in the High Court having regard to r. 3A(3) (see *Morison Kuching Pharmacy Sdn. Bhd. v. J.V. & Jones (M) Sdn. Bhd.* [1990] 2 MLJ 170; *Hj. Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man* [1990] 3 MLJ 45; *Shafie bin Ahmad v. Hajjah Fatimah bt. Ahmad & 3 Ors.* [1991] 3 CLJ 2217; *Elayachee v. Woo Sin Tip* [1991] 3 MLJ 108).

Preparation of Record of Appeal After 1 August 1987

Before the effective date of the amendment P.U. (A) 67/1988 (i.e. before 1 August 1987), O. 49 r. 3 of the SCR applied to an appellant whether or not he was represented by a solicitor; all records of appeal had to be prepared by the Court appealed from. But from 1 August 1987 r. 3(1) requires the record of appeal to be prepared by the Court appealed from where the appellant is not represented by a solicitor. On the other hand r. 3A(1) requires preparation of the appeal record by the appellant where he is represented by a solicitor.

Memorandum of Appeal After 1 August 1987 but Before 1 January 1991

And then there arose some confusion. While r. 3A(3) provides (for the appellant represented by a solicitor) that two copies of the appeal record have to be filed in the High Court within 6 weeks of "the receipt of the notification from the Court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready", O. 55 r. 2(1) of the Rules of the High Court however provided (before 1 August 1991) that within 14 days from the date of service of the notice referred to in O. 49 r. 3(2) of the SCR a memorandum of appeal had to be filed in the High Court. The notice in O. 49 r. 3(2) SCR, as stated earlier, is the notification in Form 141 to an appellant who is not represented by a solicitor. There was before 1 January 1991 no mention in O. 55 r. 2 of the Rules of the High Court of the appellant represented by a solicitor nor the time frame within which he had to file his memorandum of appeal. Thus the judicial conflict of views as to when time started to run for the appellant represented by a solicitor.

Memorandum of Appeal after 1 January 1991

With the intervention of legislation the conflict in the judicial views has been resolved. The anomaly has been resolved with the amendment of O. 55 r. 2 of the Rules of the High Court 1980 by P.U. (A) 462/90 as pointed out in *Elayachee*. It came into effect on 1 January 1991 and reads,

> 2. (1) The appellant shall, within 14 days from the date of service on him of the notice in Form 141 under O. 49, r. 2(4) or r. 3. sub-rule (2) of the Subordinate Court Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A.
>
> (2) ...

Notification that Certified Copy of Evidence and Grounds of Decision (O. 49 r. 2(4)) or Record of Appeal (O. 49 r. 3(2)) are ready - Form 141

It will be noticed that Form 141 in the First Schedule to the SCR and specified in O. 49 assumes a role of very great importance for two reasons. For the purpose of calculating the time within which to file the memorandum of appeal, in view of O. 55 r. 2 of the Rules of the High Court 1980 time runs for 14 days from date of the receipt by the appellant of Form 141, not from the date of receipt of the notes of evidence or grounds of decision. Secondly, the appellant has also the same period within which, under O. 49 r. 5(a) and (b), SCR, to deposit in the Court appealed from a sum sufficient to cover the costs of preparing a sufficient number of the appeal records (this provision in r. 5(a) is meant for the appellant who is not represented by a solicitor) and to lodge a sum of RM250 in the same Court as security for the costs of the appeal since r. 2(5) specifically provides for such payments within 14 days from the date of "**the receipt of the notification**". (Emphasis mine).

Thus the appellant who is represented by a solicitor must make the said deposit as required under r. 2(5)(b) and must expect to have all the necessary documents with him, all within 14 days from the date of the receipt of the notification in Form 141, before he can prepare a memorandum of appeal to file in the High Court.

Order 49 r. 2(4) stipulates notification in Form 141 by the Court to the appellant. This must relate to the notification in Form 141 by the Court to the appellant who is represented by a solicitor as O. 49 r. 3(2) makes provision for notification in Form 141 to be sent to an appellant who is not represented by Counsel. It is quite obvious that would call for the appellant represented by a solicitor to be supplied from the Court appealed from with a certified copy of the notes of evidence as also indeed, in almost all cases, to be supplied with the grounds of decision before he can decide whether to proceed with the appeal and to prepare his

memorandum of appeal to be filed in the High Court. He should be able to get a certified copy of the notes of evidence and the grounds of decision as soon as he pays the praecipe fees for them. It is after going through the grounds and the notes of evidence that the solicitor, if he thinks he has to proceed with the appeal, makes the deposit required under O. 49 5(b) of the SCR. All these will have to be done within 14 days of the date he receives the notification under Form 141. Thus precious time would be lost if the grounds of decision and the certified copy of the notes of evidence are not ready and the actual time (a mere 14 days) given to an appellant to file his memorandum of appeal will be diminished through no fault of his.

The appellant who is not represented by Counsel does not have the burden of preparing the appeal record as the record (which record would include the notes of evidence and the grounds of decision - see O. 49 r. 3(1)) has to be prepared by the Court appealed from. In the case of the appellant represented by a solicitor, his solicitor will have to run around to have various documents needed under the rules typed or photostated, bound and readied as an appeal record if he is proceeding with the appeal. As pointed out a memorandum of appeal will also have to be prepared and filed in the High Court within 14 days of the date of receipt of the notification in Form 141. And under O. 55 r. 2(2) of the Rules of the High Court the appellant shall within the same 14 days serve on the respondent a copy of the memorandum **and a copy of the appeal record**, though strangely under O. 49 r. 3A(3), SCR the appellant needs only to file the appeal record in the High Court six weeks after receipt of notification that the notes of evidence and grounds of decision are ready. It cannot therefor be gainsaid that a copy of the notes of evidence and the grounds of decision must be ready before notification under Form 141 is sent out by the Court. Otherwise it is also conceivable that an appellant who is represented by a solicitor can be out of time through no fault of his if the notes of evidence or the grounds of decision are only made ready after the two weeks period has passed after notification.

My view is that the Registrar of the Court appealed from must comply strictly with r. 2(4) or r. 3(2) of O. 49, SCR. For ease of reference I would like to reproduce rr. 2(4) and 3(2) where Form 141 is specified and other related provisions. Rule 2(4) with related provisions reads:

> 2. (1) ...
>
> (2) ...
>
> (3) The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. **The Court appealed from shall thereupon supply to the appellant, upon payment of the fee therefor, a certified copy of the notes of evidence, a certified copy of the judgment, or, in case no written judgment has been delivered, of the grounds of decision**.
>
> (4) **As soon as the certified copy is ready, the Court shall notify the appellant in Form 141**.
>
> (5) **Within 14 days from the receipt of the notification**, the appellant shall, unless the Court for sufficient cause otherwise orders -
>
> (a) deposit in the Court appealed from a sum which in the opinion of the Registrar will cover the costs of preparing a sufficient number of copies of the appeal record for the use of the High Court and the parties to the appeal; and
>
> (b) lodge in the Court appealed from a sum of two hundred and fifty dollars, or such lesser sum as the Court may in any case direct, by way of security for the costs of the appeal.
>
> (Emphasis added)

Rule 3(2) reads,

> 3. (1) ...
>
> (2) As soon as the appeal record is ready the Court appealed from shall serve the appellant with notice in Form 141.

The prescribed notification, Form 141, appears in the First Schedule to the SCR, and reads as follows -

> No. 141
>
> | | |
> |---|---|
> | NOTICE THAT NOTES OF EVIDENCE AND GROUNDS OF JUDGMENT/APPEAL RECORD ARE READY | O. 49 r. 2(4) O. 49, r. 3. |
>
> (Heading)
>
> Take notice that the notes of evidence and grounds of judgment/appeal record in the abovementioned proceeding are/is ready and that as regards the cost of preparing such record a sum of ... (1) is due from/to you.
>
> .....
> Registrar/Magistrate

To: .....
.....(2)

Notes:

(1) Insert the exact amount. If there is no balance write "nil".
(2) Insert name and address of appellant.

To be noted is the reference in the marginal note in Form 141 to r. 3, the rule applicable to the appellant who is not represented by a solicitor (the relevant provision produced earlier) and to r. 2(4) (reproduced earlier).

There is another impinging provision, which was referred to earlier, with regard to Form 141. This is r. 3A(3), which has reference to an appellant who is represented by a solicitor. It states -

3A. (1) ...

(2) ...

(3) Two copies of the appeal record shall be filed in the High Court within six weeks of the receipt of the notification from Court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready.

(4) ...

From a reading of the above provisions it seems logical, subject to what I have to say about the grounds of decision of the judicial officer, that before the notes of evidence and grounds of decision mentioned in r. 2(3) or record of appeal mentioned in r. 3(2) can be supplied, the Court appealed from would have to have in the first place the notes of evidence already typed, corrected, readied, and certified and the grounds of decision of the judicial officer against whose decision the appeal was lodged already ready.

Bearing in mind r. 3(1)(c) (for the appellant not represented by a solicitor) and r. 3A(1)(c) (for the appellant represented by a solicitor) which both provide that "the absence of grounds of judgment shall not prevent the appellant from proceeding with his appeal" it would appear that the only time when a notification under Form 141 can be sent out to notify that only the notes of evidence are ready (to the appellant who is represented by a solicitor) or that a record of appeal (containing, *inter alia, the* notes of evidence but not the grounds of decision) is ready (to an appellant not represented by a solicitor) is when for very good reason like the death of the judicial officer before he could write his grounds, the grounds are not available. But if the grounds of decision are not available that must be expressly stated together with the reason why they are not available. I cannot think of any good reason for a judicial officer in the subordinate Court and still in service for not writing his grounds unless the rules otherwise provide. Except as above stated the notification must comply with Form 141.

Form 141 - Notification Requirements for Appellant Represented by Solicitor

In the case of the appellant who is represented by a solicitor the notification under r. 2(4) will be to the effect that both the certified copy of the notes of evidence and the grounds of decision are ready.

Form 141 - Notification Requirements for Appellant not Represented by Solicitor

In the case of the appellant who is not represented by a solicitor the notification under r. 3(2) will be to the effect that the appeal record (which obviously must contain the notes of evidence and the grounds of decision - see O. 49 r. 3(b) and (c) is ready and that the appellant is required to pay a certain sum of money for the cost of preparing the record of appeal, this aspect of the notification being required by Form 141 and is clearly referable to rr. 5(a) and 3(1) of O. 49 of SCR.

Present Application

Did the applicant in this case, as appellant, receive the Form 141 notification as prescribed under r. 2(4)? On 27 December 1991 the office of the solicitors for the appellant received from the Registrar of the Sessions Courts, Jitra, a letter intimating to the said solicitors that the grounds of decision of the Sessions Judge in that civil action were ready.

The letter stated that in accordance with O. 49 r. 2(5)(b), SCR, the solicitors had within 14 days of receipt of the letter, to lodge RM250 in the Sessions Court as security for the costs of the appeal and if that was not done, it meant the solicitors were not proceeding with the appeal.

The letter reminded the solicitors that under r. 3A the solicitors had to prepare the appeal record and that since that was so they were not required to deposit the sum which otherwise would have been required under r. 5(a).

The letter then stated that on payment of a stamp fee of RM6 by way of praecipe a copy of the grounds of judgment would be sent to the solicitors.

The last sentence in the letter stated that a certified copy of the notes of evidence would be supplied to the solicitors after the deposit for the security of costs as required under r. 2(5)(b) had been made. The letter did not state that the notes of evidence were ready though it gave the impression that they were ready to be supplied.

The affidavit of the solicitor in charge of the appeal in this case discloses, however, that as of 25 February 1992 the notes of evidence in the civil action were still not ready and from a check of the lower court records of this case I am satisfied that the notes of evidence were indeed not ready before 21 December 1991, the date in the letter of notification sent by the Registrar of the Sessions Court, Jitra to the applicant's solicitors.

In my view the notification dated 21 December 1991 sent by the Court deviated substantially from the prescribed form and was misleading and is invalid (see s. 62 of the Interpretation Act 1967 which is again adverted to later). Both the notes of evidence and the grounds of decision should have been ready and the solicitors informed of same for time to start running for the appellant from the date he received such notification. The letter dated 21 December 1991 from the Jitra Sessions Court to the appellant was prematurely sent as the notes of evidence were not ready for supply to the appellant and it therefore cannot be considered as a proper notification. The appellant will have to wait for a proper notification in terms of Form 141 to be sent to him. Time to prepare the record and memorandum of appeal will run from the date of receipt of the proper notification.

In passing I would like to state that I am not criticising the letter of 21 December 1991 sent to the appellant by the Jitra Sessions Court for including some matters not provided for in Form 141. There was in the letter a request for payment of the fee for the grounds of decision and there was a reminder that a deposit of RM250 had to be lodged as security for the costs of the appeal under O. 42 r. 2(5)(b) within 14 days of the notification. I think that one should bear in mind s. 62 of the Interpretation Act 1967 which states that any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead. If a notification conforms with the requirements prescribed in Form 141, and does not infringe s. 62 of the Interpretation Act 1967, an addition therein towards the end of the notification that a praecipe fee is required for the notes of evidence and that a deposit of RM250 or less has to be made as security for the costs of the appeal within 14 days from the date of receipt of the notification is helpful to the busy practitioner and is not objectionable.

From the forgoing I do not see there is any need for the applicant to apply for extension of time. Accordingly, I dismiss the application. No order as to costs.